

(3)  
No. 89-2011

Supreme Court, U.S.  
**FILED**

AUG 20 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1989

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CITY VENDING OF MUSKOGEE, INC.,

*Petitioner,*

v.

OKLAHOMA TAX COMMISSION,

*Respondent.*

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On Petition For Writ Of Certiorari To The  
United States Court Of Appeals For The  
Tenth Circuit

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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JON TOM STATON  
*Attorney of Record for*  
*Petitioner*  
728 Stadium Drive  
Hobart, Oklahoma 73651  
(405) 726-3843

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## REPLY TO RESPONDENTS BRIEF IN OPPOSITION

### I. DISMISSAL OF THE UNDERLYING BANKRUPTCY CASE DID NOT RENDER THE TAX CHALLENGES MOOT NOR DESTROY THE JURISDICTION OF THE COURT TO DECIDE THE ISSUE IN THIS ADVERSARY PROCEEDING.

In cases where a party may be prejudiced, where there is an interest in judicial economy or where reason and logic demand resolution of an issue, an adversary proceeding should be maintained after dismissal of the underlying bankruptcy case. *In re Pocklington*, 21 B.R. 199 (Bnkr. S. D. Cal. 1982); *In re Lake Tahoe Land Co.*, 12 B. R. 479 (Bnkr. D. Nev. 1981); *In re Stardust Inn*, 70 B.R. 888 (Bnkr. E.D. Pa. 1987).

The sole issue involved in the adversary proceeding is the challenge to the validity of the tax assessments. The debtor has already paid the \$85,000 initial assessment to the Oklahoma Tax Commission under protest. The taking of the wholesale license of City Vending and the second assessment of an additional \$1,400,000 in taxes and penalties drove City Vending into bankruptcy.

The debtor, City Vending, and the other creditors will be prejudiced if this adversary proceeding is abandoned, and the circuit court decision that the assessments are valid is allowed to become final. The case and controversy still exists as to the voidness of the assessments issue. The declaration of this Court that the assessments are void preserves the bankruptcy question of the priority of the other creditors and the claim of the debtor to the \$85,000 now held by the Oklahoma Tax Commission. That decision would allow the creditors and City Vending to resolve entitlement to the \$85,000 in further bankruptcy

proceedings. The case or controversy exists in bankruptcy and is not moot. Since the Oklahoma Tax Commission has possession of the \$85,000, they can in no way be prejudiced by the maintenance of the adversary proceeding.

## II. THE TWO POSITIONS TAKEN BY THE OKLAHOMA TAX COMMISSION ON VOIDNESS CANNOT BE RECONCILED.

The Oklahoma Tax Commission states that they were not a court of competent jurisdiction to decide the constitutionality of the assessments, and that they did not rule on the issue. They nevertheless argue that the issue has been decided and is now final. The two positions cannot be reconciled. If the question has been decided, it was not decided by a court of competent jurisdiction.

The Oklahoma Tax Commission has had access to the state district court, *ab initio*, to obtain a ruling on the issue by a court of competent jurisdiction. They chose not to file such an action and have blocked every attempt of City Vending to obtain such a ruling. They now argue that the decision can be made without a hearing on the merits and that it can be decided by a court of incompetent jurisdiction. Either results in a void decision.

The Oklahoma Tax Commission admission that they did not rule on the constitutionality of the taxes appears to conclude the bankruptcy question as to whether or not a court of competent jurisdiction has ruled on the issue. The issue still has not been ruled upon by any tribunal. Title 11 USC § 505 requires the bankruptcy court to rule on the defense to taxes if no court of competent jurisdiction has ruled on the matter. Finally, to require City

Vending to file under Chapter 7 and again proceed all the way back to this court to decide the question results in a total disregard of judicial economy.

Respectfully submitted,

JON TOM STATON  
728 Stadium Drive  
Hobart, Oklahoma 73651  
(405) 726-3843